

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC.

Plaintiff,

Case No.

v.

PROPOSED
CONSENT DECREE

MERRYMEETING MARKET & MARINA,
Defendant.

WHEREAS, Plaintiff Conservation Law Foundation, Inc. ("CLF") has filed the above captioned action against Defendant Merrymeeting Market & Marina, a sole proprietorship operated by Russell Weldon ("Merrymeeting Marina"), alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, at Defendant's water transportation and boat and boat building and repair facility and seeking declaratory and injunctive relief, civil penalties, and attorneys fees and costs;

WHEREAS, Defendant owns and operates a water transportation (SIC 4493) and boat and ship building and repair (SIC 3732) facility located at 318 Merrymeeting Lake Road, New Durham, NH 03855 (the "Facility");

WHEREAS, the Facility occasionally discharges stormwater associated with industrial activity to Merrymeeting Lake;

WHEREAS, Defendant has agreed to apply for a stormwater permit for the Facility;

WHEREAS, Defendant has agreed to develop a Stormwater Pollution Prevention Plan and implement additional control measures and best management practices in support of its stormwater permit application to be prepared in accordance with the requirements for SIC 4493 (sector Q);

WHEREAS, Defendant has operated in an environmentally sensitive manner, has undertaken many best practices and structural control measures designed to protect Merrymeeting Lake from pollution at significant cost, including a system of six detention ponds, and has diligently engaged with CLF in good faith upon receiving CLF's Notice Letter outlining CLF's environmental concerns.

WHEREAS, CLF is a regional, nonprofit environmental organization;

WHEREAS, CLF has alleged, in its complaint (the “Complaint”) and in a letter (the “Notice Letter”) dated September 24, 2014, sent to Defendant and others, that Defendant has violated and continues to violate Section 301(a) of the Federal Water Pollution Control Act (“Clean Water Act” “CWA” or “Act”), 33 U.S.C. § 1311(a); and

WHEREAS, CLF and Defendant (the “Parties”) agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of this Decree is the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, without the admission by Defendant of any of the facts or violations alleged in the Complaint, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). An actual, justiciable controversy exists between Plaintiff and Defendant. The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 33 U.S.C. § 1365(a).

2. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the alleged events giving rise to this action occurred at the Defendant’s Facility, located at 318 Merrymeeting Lake Road, New Durham, NH 03855, and in the Merrimack watershed, which are located within this judicial district.

II. COMPLIANCE PROGRAM

3. Defendant shall not discharge pollutants to waters of the United States from the Facility except in compliance with applicable federal and state statutes, regulations and permits.

4. Defendant will develop a written Stormwater Pollution Prevention Plan (“SWPPP”) and shall provide a copy of its SWPPP in electronic format to CLF for review and comment by no later than March 16, 2015. CLF shall respond with comments within twenty-one (21) days of receipt. Within fourteen (14) days of receiving CLF’s comments, if any, Defendant shall submit a final SWPPP to CLF, incorporating CLF’s comments, or justifying in writing why any comment is not being incorporated. The final SWPPP shall meet the requirements of the most recently issued United States Environmental Protection Agency (“EPA”) National Pollutant Discharge Elimination System (“NPDES”) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (“MSGP”). The most recent MSGP as of the date of the Parties’ signatures below is the 2008 MSGP, which expired on September 29, 2013. Defendant will update the SWPPP as necessary to comply with the 2013 MSGP when the 2013 MSGP becomes effective. The MSGP, as it may be updated or reissued from time to time, is

incorporated into this Consent Decree by reference. Development of the SWPPP shall include, at minimum, the following steps:

- a. Formation of a pollution prevention team of qualified personnel who will be responsible for preparing the plan and assisting the plant manager in implementing practices to comply with the permit.
 - b. Assessment of potential stormwater pollution sources.
 - c. Selection of appropriate control measures that minimize the discharge of pollutants during storm events for each of these sources.
 - d. Development of procedures for conducting required inspection and monitoring activities, as well as regular maintenance of control measures.
5. Defendant will mail a copy of the final SWPPP to CLF no later than May 4, 2015.
6. Defendant will select, design, install, and implement control measures (in addition to the considerable control measures already in place at the Facility), in accordance with the MSGP, to meet (or continue to meet) numeric and non-numeric effluent limits.
7. Defendant will design, install, and implement control measures that include, at minimum, the following categories of site-specific best management practices ("BMPs"):
 - a. Good housekeeping practices,
 - b. Minimizing exposure of potential pollutant sources to precipitation,
 - c. Erosion and sediment control, and
 - d. Management of runoff.
8. Defendant will design, install, and implement any additional control measures that include, but are not limited to, the sector-specific BMPs listed in the MSGP. Such BMPs shall include the BMPs described in the EPA fact sheet for water transportation facilities, available at http://www.epa.gov/npdes/pubs/sector_q_watertransportation.pdf.
9. Wherever feasible, Defendant will design, install, and implement additional control measures that employ a low-impact development (LID) approach. LID is a natural-resource-based alternative approach to site design that incorporates a variety of structural and non-structural techniques, such as vegetated areas that collect, treat and infiltrate stormwater and shallow drainage channels that slow runoff and filter it.
10. Defendant will operate in accordance with the 2008 MSGP and will, within thirty (30) days of the date that EPA issues a new general permit, submit a complete and accurate Notice of Intent ("NOI") to the EPA, and send a copy of the NOI to CLF within fourteen (14) days thereof.

III. MONITORING PROGRAM

11. Defendant will monitor four (4) times per year at all outfalls/discharge points discharging stormwater associated with industrial activity from the Facility for pollutants identified in the MSGP for the Sector Q (i.e., aluminum, iron, lead and zinc) and for the parameters for which Merrymeeting Lake is impaired (i.e., mercury and pH). The inspections must be performed pursuant to the requirements of the MSGP and include, at a minimum, all areas where industrial activities are exposed to either precipitation or stormwater runoff. Defendant will send a copy of each inspection and/or sampling result to CLF no later than ten (10) days after receipt.

Recognizing that Defendant agrees to apply for coverage under the MSGP in the future as set forth in paragraph 10, and that Defendant will not be able to submit quarterly tests to EPA unless and until Defendant obtains said MSGP coverage, Defendant may defer any stormwater runoff testing until after the implementation of control measures (see paragraph 14), but must complete stormwater runoff testing at least once within twelve months after the Effective Date of this Consent Decree. Once Defendant has obtained coverage under the MSGP in the future as set forth in paragraph 10, Defendant will commence submitting quarterly tests to EPA.

12. Defendant will comply with all other monitoring requirements of the MSGP. Defendant will send a copy of each inspection and/or sampling result to CLF no later than ten (10) days after receipt.

13. Defendant may take additional samples of its stormwater discharges. If it does so, Defendant will send a copy of each such inspection and/or sampling result to CLF no later than ten (10) days after receipt.

14. During the first year after the Effective Date of this Decree, Defendant shall implement control measures as necessary to meet the benchmark levels identified in the MSGP for Sector Q (i.e., aluminum, iron, lead and zinc) of the MSGP after one year from the entry by the Court of this Decree (the day that the Court enters this Decree shall be the "Effective Date").

15. During the first year after the Effective Date of this Decree, Defendant shall implement all measures necessary to eliminate any process wastewater discharges occurring at the Facility. Thereafter, Defendant shall not discharge process water, including pressure wash water, to waters of the United States unless such a discharge is covered by, and in compliance with the conditions of, an individual NPDES discharge permit.

16. During the life of the Decree, CLF, through representatives, may conduct 1 site inspection at the Facility. The site inspection shall occur during normal business hours and CLF's representatives shall be accompanied by Defendant's authorized representative during each site visit. During the site inspection, CLF representatives may collect samples of stormwater discharges and take photos at the Facility. Any samples taken by CLF shall be split samples with one half of the sample remaining in the possession of Defendant. CLF will send a copy of each sampling result to Defendant no later than ten (10) days after receipt.

17. During the life of the Decree, Defendant shall copy CLF on all documents related to stormwater quality or Clean Water Act compliance regarding the Facility submitted to any government agency including, but not limited to, the EPA, NHDES, and the Town of New

Durham. Such documents shall be provided to CLF concurrently as they are sent to the agencies and/or municipalities.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT

18. Within one (1) year of the Effective Date, Defendant shall make a payment of twelve thousand dollars (\$12,000) to the Merrymeeting Lake Association, to be placed into a segregated fund ("Loon Habitat Fund") that shall be used for loon protection and recovery efforts on Merrymeeting Lake. Defendant shall notify CLF in writing when the payment is made and provide a copy of the check. Such payment shall be made to the following address:

Merrymeeting Lake Association c/o Mark Sullivan, President
P.O. Box 468
New Durham, NH 03855

19. For each exceedance of the MSGP benchmarks described in paragraph 14 of this Decree above for three (3) years from the entry by this Court of the Decree, Defendant shall make an additional payment to the Merrymeeting Lake Association's Loon Habitat Fund in the amount of two hundred fifty dollars (\$250) for environmental restoration of or other environmental benefit to Merrymeeting Lake. Payment of each such additional amount shall be due fourteen (14) days following each exceedance. Defendant shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Provided, however, that no additional SEP payment shall be due for any exceedance of an MSGP benchmark revealed within the first twelve months following the Effective Date. Pursuant to paragraph 41, below, Defendant shall not be required to make any payment for events relating to a Force Majeure event.

20. For each missed deadline included in this Decree, including but not limited to failures to timely conduct quarterly benchmark monitoring and inspections pursuant to Parts 4 and 6 of the MSGP, but not including missed payment deadlines (discussed in paragraph 25 below), Defendant will make an additional payment to the Merrymeeting Lake Association's Loon Habitat Fund, in the amount of two hundred fifty (\$250). Payment of each such additional amount shall be due fourteen (14) days following each missed deadline. Defendant shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Pursuant to paragraph 41, below, Defendant shall not be required to make any additional payment for events relating to a Force Majeure event.

21. Following the time period for and implementation of the measures referenced in paragraph 15 relating to the elimination of process wastewater discharges, for every day that Defendant discharges process water to waters of the United States without coverage for such discharge under an individual NPDES discharge permit and compliance with the conditions of that individual NPDES discharge permit, Defendant will make an additional payment to the Merrymeeting Lake Association's Loon Habitat Fund, in the amount of five hundred dollars (\$500). Payment of each such additional amount shall be due fourteen (14) days following each unauthorized process water discharge. Defendant shall notify CLF in writing concurrently each time a payment is made and provide a copy of each check. Pursuant to paragraph 41, below, Defendant shall not be required to make any additional payment for events relating to a Force Majeure event.

22. None of the SEP payments shall be disbursed to CLF.

V. LIQUIDATED ATTORNEY FEES AND COSTS

23. Defendant shall pay to CLF a sum of twelve thousand dollars (\$12,000) in full and complete satisfaction of CLF's fees and costs to date in this matter, including without limitation attorney fees, expert fees, filing fees and other costs. These liquidated fees and costs shall be paid within fourteen (14) days of the Effective Date of this Decree.

24. To help defray CLF's reasonably anticipated costs incurred in conducting compliance monitoring and case management during the term of this Decree, Defendant shall pay CLF an additional sum of one thousand dollars (\$1,000) contemporaneous with the payment of fees specified in paragraph 23.

25. In the event that any payment owed by Defendant under the Decree is not made on or before the due date, Defendant shall be deemed in default of its obligations under the Decree. In addition to a continued requirement to make said payment, Defendant shall pay to CLF liquidated attorney fees of twenty five dollars (\$25) for each day the payment is late. Pursuant to paragraph 41, below, Defendant shall not be required to make any additional payment for events relating to a Force Majeure event.

VI. EFFECT OF DECREE

26. CLF covenants not to sue and releases Defendant (and its/his parent corporations, subsidiaries, officers, directors, shareholders, employees, agents, and consultants) from any and all claims, causes of action, or liability under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, for damages, penalties, fines, injunctive relief, or any other claim or relief (i) relating to or resulting from noncompliance with the MSGP at the Facility located at 318 Merrymeeting Lake Road, New Durham, NH 03855 occurring prior to the date the Court enters this Decree or (ii) for any past violations alleged in the Complaint, or (iii) for any violations alleged or referenced in the Notice Letter.

27. Defendant releases and discharges CLF, its representatives, assigns, agents, employees, officers, and attorneys, including those who have held positions in the past from any and all claims, liability, demands, penalties, costs, and causes of action of every nature which concern or are connected with this action.

28. Neither this Decree, nor terms thereof, nor performance of the terms thereunder by Defendant shall constitute or be construed as an admission or acknowledgment by Defendant of the factual or legal assertions contained in this Decree or in CLF's Complaint, and Defendant retains the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Decree, the validity of the facts or determinations contained in this Decree or the Complaint. Neither this Decree, nor terms thereof, nor performance of the terms thereunder, shall constitute or be construed as an admission or acknowledgment by Defendant of any liability, or an admission of violation of any law, by Defendant or by its/his officers, directors, employees, agents, successors, or assigns.

29. CLF does not, by consent to the Decree, warrant or aver in any manner that Defendant's compliance with this Decree will constitute or result in compliance with federal or state law or regulation. Nothing in this Decree shall be construed to affect or limit in any way the obligation of Defendant to comply with all federal, state, and local laws and regulations governing any activity required by this Decree.

30. This Decree constitutes the entire agreement among the Parties concerning the subject matter hereof and supersedes all previous correspondence, communications, agreements and understandings, whether oral or written among the Parties.

31. All payments pursuant to this Decree shall be made in form of a bank check.

32. Any notice required or permitted under this Decree shall be in writing and sent to:

For CLF:

Zachary Knox Griefen
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
zgriefen@clf.org

For Defendant:

Russell Weldon
Merrymeeting Market and Marina
318 Merrymeeting Lake Road
New Durham, NH 03249

With a copy to:

Daniel Will, Esquire
Joshua Wyatt, Esquire
Devine, Millimet & Branch, PA
111 Amherst Street
Manchester, NH 03101
jwyatt@devinemillimet.com

33. This Decree shall remain in effect if Defendant relocates the Facility to a different location.

34. Sections I, IV, V, VI, VII, and VIII of this Decree shall remain in effect if Defendant ceases to be the owner and/or operator of the Facility, regardless of whether the Facility continues to operate or not.

VII. REVIEW AND TERM OF DECREE

35. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and the EPA. Therefore, upon signing of this decree by the Parties, CLF shall serve copies of this Decree upon the EPA Administrator, the Regional EPA Administrator, and the Attorney General for review, as required by 40 C.F.R. § 135.5.

36. Upon the expiration of the forty-five-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will jointly move the Court for entry of this Decree. This Decree shall take effect on the date it is entered by this Court and shall terminate three (3) years from when it is entered by the Court. If for any reason the Court should decline to approve this Decree in the form presented, the Parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Decree.

VIII. MODIFICATION AND ENFORCEMENT OF DECREE

37. This Decree may be modified only upon written consent of the Parties and the approval of the Court.

38. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Decree.

39. Counterparts. Facsimile, electronic and scanned signatures shall be deemed to be originals for all purposes. Copies of the original Agreement, whether transmitted by facsimile or other means, shall be effective. This Agreement may be signed in counterparts.

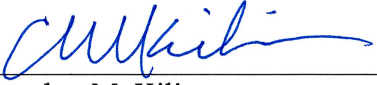
40. Each person signing this Decree represents and warrants that s/he has been duly authorized to enter into this Decree by the Party on whose behalf it is indicated that the person is signing.

41. Force Majeure. For purposes of this Decree, a "Force Majeure event" is defined as any event arising from causes beyond the control of Defendant, including its contractors and subcontractors, that delays or prevents the timely performance of any obligation under this Decree, except for obligations as provided in ¶¶ 18, 22, 23, and 24, notwithstanding Defendant's best efforts to avoid the delay. The deadline for the responsibility to perform any action under this Decree may be extended for up to the number of days of nonperformance caused by the Force Majeure event, provided that Defendant complies with the notice requirements of this paragraph. Examples of events which may constitute Force Majeure events include severe weather events, natural disasters, and national, state or regional emergencies. Examples of events that are not Force Majeure events include, but are not limited to, normal inclement weather, unanticipated or increased costs or expenses of work, Defendant's financial difficulty in performing such work and acts or omissions attributable to Defendant's contractors or representatives.

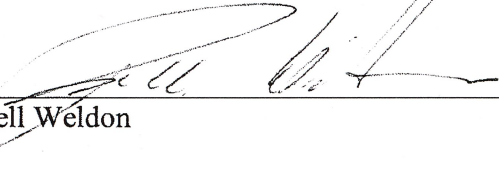
If any event occurs which may delay or prevent the performance of any obligation under this Decree, caused by a Force Majeure event, Defendant shall notify CLF, at the address specified in ¶32 above, within three (3) business days after Defendant first knows, or should know, that the event might cause a delay. This written notice to CLF shall include, without limitation: (i) an explanation of the causes of any actual or expected delay or noncompliance; (ii) the anticipated duration of delay; (iii) the measures taken and to be taken by Defendant to prevent or minimize the delay or nonperformance; (iv) a proposed schedule for the implementation of such measures; and (v) a statement as to whether in the opinion of Defendant the Facility can continue to operate in a manner which will not violate this Decree.

If CLF agrees that a delay or anticipated delay in performance is attributable to Force Majeure, the time for performance of the obligations under this Decree that are affected by the Force Majeure event shall be extended for the period of time reasonably necessary to allow performance of the obligation to the extent the delay was caused by a Force Majeure event.

CONSERVATION LAW FOUNDATION

By:  Date: 2/23/15
Christopher M. Kilian
Title: Vice President

RUSSELL WELDON D/B/A
MERRYMEETING MARKET & MARINA

By:  Date: 2-20-15
Russell Weldon

ENTERED and DATED this ____ day of _____, 201__

Honorable
United States District Judge